Supreme Court, U. S.
FILED
JAN 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

Nos. 75-73, 75-109.

JANE HUNERWADEL,
for herself and all others similarly situated,
APPELLANT IN No. 75-109,

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney for the County of Suffolk; the District Attorneys for all other counties, their agents, successors, those acting in concert with them, and all others similarly situated,
APPELLANTS IN No. 75-73,

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,
APPELLEES IN NOS. 75-73 AND 75-109.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Intervenor.

Of Counsel:
THOMAS P. RUSSELL,
ROBERT J. REYNOLDS,
Suite 524,
40 Court Street,
Boston, Massachusetts 02108.
MARY T. WELBY,
51 St. Rose Street,
Boston, Massachusetts 02130.

THOMAS P. MCMAHON,
P.O. Box 28,
Walpole, Massachusetts 02081.
BRIAN A. RILEY,
MARY LAURA RUSSELL,
Suite 524,
40 Court Street,
Boston, Massachusetts 02108.
Attorneys for Intervenor.

BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

Table of Contents.

Opinion below 2

Jurisdiction 2

Statutes involved 3

Questions presented 5

Statement of the case 6

Summary of argument 10

Argument 14

I. The Massachusetts statute prohibiting physicians from performing abortions on minor, unmarried girls without parental or court consent is constitutional on its face 14

A. The common law rule of parental consent applies to abortions as well as all other medical and surgical procedures 15

B. The right to privacy should not be extended to include minors who seek abortions without parental or court consent 17

C. The Massachusetts statute is narrowly drawn and tailored to serve the best interests of minor unmarried girls 23

D. The Massachusetts statute furthers legitimate as well as compelling state interests 28

II. The district court erred in refusing to join as defendants the parents of Mary Moe 31

III. The district court erred in refusing to appoint a guardian ad litem to protect the interests of Mary Moe 32

IV. The district court erred in refusing to certify questions of state law to the Supreme Judicial Court of Massachusetts 33

Conclusion 35

Table of Authorities Cited.

Cases.

Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863) 32

Bonner v. Moran, 126 F. 2d 121 (D.C. Cir. 1941) 16

Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973) appeal dismissed, 417 U.S. 279 (1974) 26

Doe v. Bolton, 410 U.S. 179 (1973) 11, 15

Doe v. Rampton, 366 F. Supp. 189 (D. Utah, 1973) 28

Doremus v. Board of Education, 342 U.S. 429 (1952) 19

Duncan v. Louisiana, 391 U.S. 145 (1968) 18

Engel v. Vitale, 370 U.S. 421 (1962) 19

Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960) 2

Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975) 33

Ginsberg v. New York, 390 U.S. 629 (1968) 20, 30

Goss v. Lopez, 419 U.S. 565 (1975) 32

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 18

In re Gault, 387 U.S. 1 (1967) 18, 19

Lehman Brothers v. Schein, 416 U.S. 386 (1974) 34

Logan v. Murray, 6 Serg. & R. (Penn.) 175 (1820) 27

Loving v. Virginia, 388 U.S. 1 (1967) 18

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 18

Matthewson v. Perry, 37 Conn. 435 (1870) 27

Meyer v. Nebraska, 262 U.S. 390 (1923) 28

Noe v. True, 507 F. 2d 9 (6th Cir. 1974) 32, 33

Oregon v. Mitchell, 400 U.S. 112 (1970) 18

People ex. rel. Barry v. Mercein, 3 Hill (N.Y.) 399 (1842) 27

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 29

Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975), prob. juris. noted, U.S. (Oct. 7, 1975) 11

Prince v. Massachusetts, 321 U.S. 158 (1944) 18, 28, 29

Pyle v. Waechter, 292 Iowa, 695, 210 N.W. 926 (1926) 27

Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, A. 2d 537 (1964) 16, 17

Reddington v. Clayman, 334 Mass. 244, 134, N.E. 2d 920 (1956) 15

Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974) 16

Roe v. Wade, 410 U.S. 113 (1973) 2, 11, 15, 17, 21, 28, 29

Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949) 27

School District of Abington v. Schempp, 374 U.S. 203 (1963) 19
Soper v. Igo, Walker & Co., 121 Ky. 550, 89 S.W. 538 (1905) 27
Stanley v. Illinois, 405 U.S. 645 (1972) 29
State v. Koome, 84 Wash. 2d 901, 530 P. 2d 260 (1975) 26, 27
Thompson v. Groshens, 342 F. Supp. 516 (E.D. Pa. 1972), affirmed, 475 F. 2d 127 (3d Cir. 1973), cert. denied, 414 U.S. 825 (1973) 32
Tinker v. Des Moines Indep. Com. School District, 393 U.S. 503 (1969) 19
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 27
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 19
Wisconsin v. Yoder, 406 U.S. 205 (1972) 29
Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974) 26
Zoski v. Gaines, 271 Mich. 1,260 N.W. 99 (1935) 16

STATUTES.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS.

United States Constitution
Fifth Amendment 13, 31
Fourteenth Amendment 6

28 U.S.C.
§ 1253 2
§ 1331 2
§ 1343 2
§ 2201 2
42 U.S.C. § 1983 2
Mass. G.L. c. 112 3, 6
§ 12I 3
§ 12J 3
§ 12N 3, 16, 23
§ 12P 3, 5, 6, 14, 30
§ 12Q 3, 4, 30
§ 12R 3, 5, 14, 30
Mass. G.L. c. 265, § 23 7n
Federal Rules of Civil Procedure, Rule 19(a) 32
Massachusetts Supreme Judicial Court Rule 3:21 34

MISCELLANEOUS.

Prosser, Law of Torts (4th ed. 1971) 16
Restatement of Torts (1934) 16
Note, 60 Va. L. Rev. 305 (1974) 16
Osofsky & Osofsky, The Abortion Experience: Psychological & Medical Impact (1973) 21n
Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115 (1973) 16, 17

In the
Supreme Court of the United States.

OCTOBER TERM, 1975.

Nos. 75-73, 75-109.

JANE HUNERWADEL,
for herself and all others similarly situated,
APPELLANT IN No. 75-109,

FRANCIS X. BELLOTTI, Attorney General of the
Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney for the
County of Suffolk; the District Attorneys for all other counties,
their agents, successors, those acting in concert with them,
and all others similarly situated,
APPELLANTS IN No. 75-73,

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY,
INC.; GERALD ZUPNICK, M.D.; and all others
similarly situated,
APPELLEES IN Nos. 75-73 AND 75-109.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Intervenor.

This brief is submitted on behalf of Jane Hunerwadel who intervened in the district court on behalf of herself and all others similarly situated.

Opinion Below.

The opinion of the district court is reported at 393 F. Supp. 847 (A.J.S. 1-32).[1]

Jurisdiction.

This action for declaratory and injunctive relief was brought by the plaintiffs under the provisions of 28 U.S.C. §§ 1331, 1343, 2201 and 42 U.S.C. § 1983 (A. 10).[2] The final order of the district court was entered on April 28, 1975 (A. 8). A substitute order correcting inadvertencies in the original order was entered on May 9, 1975, nunc pro tunc (A. 8). The appellant filed her notice of appeal in the district court on May 20, 1975 (A. 8). On November 17, 1975, this Court entered an order noting probable jurisdiction. The Court also consolidated this appeal with the appeal filed by Attorney General Francis X. Bellotti in No. 75-73.

The jurisdiction of the Court to review this order is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Court to review the order of the district court on direct appeal. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960).

---

[1] Copies of the opinion and order of the district court are found in the Appendix to the Jurisdictional Statement of the Attorney General. References to the district court opinion will be made by the abbreviation A.J.S.

[2] The references to the Appendix in No. 75-73 will be made by using the abbreviation A.

Statutes Involved.

The district court order declared § 12P, c. 112, of the Massachusetts General Laws unconstitutional (A.J.S. 34). The district court also declared unconstitutional all other sections of chapter 112 insofar as they make specific reference to § 12P (A.J.S. 34). These sections, which are set forth below together with § 12P, are §§ 12N, 12Q and 12R.

The reference in § 12N to §§ 12I and 12J refer to abortions performed prior to the twenty-fourth week of gestation (§ 12I) and subsequent to the twenty-fourth week of gestation (§ 12J).

Section 12N:

> Except in an emergency requiring immediate action no abortion may be performed under sections twelve I or twelve J unless
>
> (1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and
>
> (2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery.
>
> Except in an emergency requiring immediate action no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services.

Section 12P:

> (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents

refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.

(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent file.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

Section 12Q:

Any person who commits an act in violation of sections twelve L or twelve M shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve L or twelve M which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who wilfully violates the provisions of sections

twelve N or twelve O shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars.

Section 12R:

The attorney general or any person whose consent is required either pursuant to section twelve P or under common law, may petition the superior court for an order enjoining the performance of any abortion that may be performed contrary to the provisions of sections twelve I through twelve Q.

Questions Presented.

1. Whether Mass. G.L. c. 112, § 12P, which prohibits physicians from performing abortions on unmarried, minor girls under the age of eighteen without parental consent or the consent of a judge of the Superior Court, is unconstitutional on its face?
2. Whether the district court erred in refusing to join as necessary party defendants the parents of Mary Moe?
3. Whether the district court erred in refusing to appoint a guardian ad litem to protect the interests of Mary Moe?
4. Whether the district court erred in refusing to certify questions to the Supreme Judicial Court of the Commonwealth of Massachusetts for an interpretation of the "good cause shown" provision of Mass. G.L. c. 112, § 12P?

Statement of the Case.

This is a class action for declaratory and injunctive relief (A. 9-15). The plaintiffs are Mary Moe, William Baird, Gerald Zupnick, M.D., and Parents Aid Society, Inc. (hereinafter Parents Aid) (A. 10). The defendants are Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, and the District Attorneys for all counties in the Commonwealth (A. 41-42). Jane Hunerwadel, the appellant, was permitted to intervene in the district court, on behalf of herself and all others similarly situated (A. 3).

The plaintiffs alleged in their complaint that the parental consent provision of Mass. G.L. c. 112, § 12P, violates their constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment (A. 14). The plaintiffs commenced this action on October 31, 1975, two days before the statute was to take effect (A. 2). On the next day, District Judge Frank H. Freedman issued a restraining order which temporarily enjoined the enforcement of the statute (A. 2). After a three-judge court was convened (A. 2), the hearing on the preliminary injunction was merged with the hearing on the merits (A. 5). On April 28, 1975, the district court entered a majority opinion and an order declaring Mass. G.L. c. 112, § 12P, and all other sections of chapter 112 insofar as they make specific reference thereto, unconstitutional, and permanently enjoined their enforcement (A. 8). A vigorous and lengthy dissent was filed by Senior District Judge Anthony J. Julian.

Mary Moe[3] is a fictitious name for an unmarried, unemancipated, minor girl, who, at the time of trial, was 16

[3] Originally there were three other Mary Moes. The four were referred to as Mary Moe I, II, III, and IV. Only Mary Moe I testified in the district court. The court dismissed for want of proof as to the other Mary Moes.

years old (Tr. 132).[4] She resides at home with her parents (Tr. 157). Neither the defendants, the intervenor, nor their attorneys know her true identity (Tr. 171).[5] At the time this action was brought, she alleged by way of affidavit that she was about nine weeks pregnant and desired to have an abortion without informing her parents (A. 17-18). Within several hours after the temporary restraining order was entered, Dr. Zupnick performed an abortion on Mary Moe at the abortion center operated by Parents Aid (Tr. 139, 142; A. 204). Her parents were neither joined as parties to the action nor were they informed of the abortion (A.J.S. 3). The court has refused to appoint a guardian to act in her behalf (A.J.S. 3). Mary Moe testified at trial, in camera, that although she had a close relationship with her parents and that her parents loved her and were concerned for her welfare (Tr. 149), she wanted the abortion because she felt that if her parents learned of her pregnancy they would get upset and might take some action against the boy who made her pregnant (Tr. 162).

Gerald Zupnick describes himself as a "contract physician" (A. 200). He performs abortions at centers operated by Parents Aid in both Boston and New York (A. 249). He is the only physician who performs abortions at Parents Aid in

[4] Since Mary Moe's testimony was impounded by the district court it was not reproduced by appellant in No. 75-73. References to her testimony in the original transcript will be made by using the abbreviation Tr.

[5] Since Mary Moe's true identity was not disclosed to the attorneys for either the defendants or the intervenor, it was impossible effectively to cross-examine her testimony or to offer rebuttal testimony. The district court prohibited the defendants from asking Mary Moe her date of birth, which would have revealed her age at the time of impregnation. If Mary Moe was under the age of 16 at the time of impregnation, she would have been the victim of a statutory rape under Mass. G.L. c. 265, § 23. Moreover, the court impounded her testimony and directed the attorneys for the defendants and intervenor not to take any steps to learn her true identity (Tr. 171).

Boston (A. 204). He resides in New York and travels to Boston two days a week to perform abortions (A. 226). He is not affiliated with any hospital (A. 224-25). Although he occasionally sees other patients, the sole source of his medical income is from abortions performed at Parents Aid (A. 238). Dr. Zupnick is compensated by Parents Aid on the basis of a fee-splitting arrangement whereby he receives one third of the fee paid for each abortion he performs (A. 220). At the time of the trial, his most recent check from Parents Aid in Boston for two days work amounted to $600 (A. 221). He has received as much as $900 for a similar period (A. 249). Normally, he does not participate in the pre-abortion decision-making process (A. 202), and spends on the average a total of 5 to 7 minutes with each girl (A. 230-31). He does not require parental consent for minors who seek abortions and who do not desire to inform their parents (A. 234). He has performed abortions on minor girls as young as 14 years of age without parental consent (A. 237, 243).

Although the district court did not decide whether William Baird had standing to be a plaintiff in this action (A.J.S. 5), a few observations are in order. He describes himself as director and chief counselor of Parents Aid (A. 259). He testified that, under his direction, Parents Aid has provided abortions without parental consent to minor girls as young as 12 years old in New York and 13 or 14 years old in Boston (A. 289).

The appellant, Jane Hunerwadel,* has three daughters who are 9, 12 and 13 years of age (A. 360). Shortly after this

* Jane Hunerwadel intervened in the district court along with thirteen other parents of unmarried minor girls. They are Kathleen Roth, John J. Lally, Jr., Patricia A. Lally, Francis Gibson, Elizabeth Gibson, Mary Stanton, Paul Aylward, Joseph Healy, Katherine Healy, Jean Healey, Rita Callahan, R.N., Jerril Walsh, R.N., and Jane Doe, a pseudonym for the mother of an unmarried 17-year-old girl who at the time of intervention was 12 weeks pregnant. The district court dismissed as to these thirteen intervenors for want of proof.

action was commenced, she was allowed to intervene as a defendant on behalf of herself and all others similarly situated (A. 3). Although she does not believe that any of her daughters are pregnant, she is not absolutely sure (A. 367). She has neither met Mary Moe nor does she know her true identity (Tr. 171). She intervened primarily out of her concern that, if one of her daughters were pregnant, she might have an abortion without informing her and her husband (A. 367). Although she believes that an abortion is the least desirable alternative to an unplanned pregnancy, she would not refuse consenting to one of her daughters having an abortion (A. 361). However, prior to consent to an abortion, she would like the opportunity to discuss with her daughter the circumstances which led to the pregnancy, her feelings about the baby and her feelings about the father (A. 361-62). She would also like her daughter to know that she had her parents' continued interest and support (A. 361-62). Most importantly, she would want the opportunity to explain to her daughter all of the possible alternatives to an abortion and to insure that all the resources of the community were made available to her daughter (A. 362). Finally, if an abortion were to be performed, she would want to be sure that it was performed by a skilled physician at a qualified facility which provided proper follow-up care (A. 362).

During the course of the proceedings in the district court, expert testimony was presented by both the plaintiffs and the defendants. Testifying for the plaintiffs were Dr. Somers Sturgis, Dr. Jane E. Hodgson and Dr. Carol Nadelson; and for the defendants were Dr. Jules Rivkind and Dr. Raymond E. Yerkes. This testimony dealt primarily with the medical, psychological and emotional aspects of pregnancy and abortions in girls under 18 years of age. Although the appellant does not intend to give a detailed summary of the expert evidence at this point, there are certain areas which should be

brought to the Court's attention. Further references to testimony will be made at appropriate points in the Argument (*post*).

Both the plaintiffs' and defendants' experts were in unanimous agreement that a pregnancy for an unmarried minor is accompanied by a period of great emotional stress and that parental support and involvement is extremely important and should be encouraged in every instance (A. 89, 92, 95, 147, 148, 180, 316, 340). However, the experts disagreed as to the ability of minor girls under 18 to give an informed consent to an abortion. The plaintiffs' experts felt that a majority of 16- and 17-year-olds are capable of giving an informed consent. The defendants' experts testified that age 18 is a significant turning point (A. 342), but that "some" (A. 323) 16- and 17-year-old girls are capable of giving an informed consent. Generally, as a class, girls under 18 are not capable of giving such a consent because "they have difficulty in both arriving at the final decision and carrying it through with an understanding of all the implications" (A. 342). Defendants' experts concluded that age 18 was a significant turning point because it is the age when adolescents are graduating from high school and beginning to sever family ties by going to college or moving out on their own (A. 343). With regard to conflicts in the expert testimony, the district court held it would resolve all conflicts in favor of the defendants because "either way, our ultimate conclusions would be the same" (A.J.S. 12).

Summary of Argument.

The impact of the district court decision can only be described as devastating. By permitting minor, unmarried girls to obtain abortions without first seeking the consent of their

parents, the decision condones deception and impedes intra-family communication. Furthermore, by separating minor girls from their parents, who have always been presumed to be their natural guardians and protectors, the decision strikes at the very heart of the fundamental social unit of our society — the family.

To the extent that the constitutional question presented by this appeal involves parental consent, it is similar to the question presented in *Planned Parenthood* v. *Danforth*, 392 F. Supp. 1362 (E.D. Mo. 1975), *prob. juris. noted*, U.S. (Oct. 7, 1975). However, unlike the statute held constitutional in *Danforth*, the Massachusetts statute provides that if a minor girl is unable to obtain parental consent for an abortion, a judge of the Superior Court may, for "good cause shown," consent to an abortion.

I.

The intervenor contends that the Massachusetts statute is merely a codification of the common law rule that minors are incompetent to consent to medical and surgical treatment. Thus, the statute does not infringe upon any right of minor, unmarried girls. The primary purpose of the statute is to provide additional remedial safeguards to insure that physicians do not perform abortions on minor girls who are unable to give an informed consent.

A. One of the basic underlying premises of *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), is that an abortion is primarily a medical procedure which should not be treated differently from other medical procedures. Therefore, since minors have always been required to obtain parental consent for all medical and surgical pro-

cedures, abortions should not be treated differently. The statute codifies the common law rule of parental consent as it applies to abortions for minor girls.

B. The right to privacy should not be extended to minors who seek abortions without parental consent. This Court has never held that the constitutional rights of minors are co-extensive with those accorded adults. Constitutional rights have only been extended to minors when there was a unity of interest between the parent and child in opposition to the challenged state regulation and where the exercise of such rights was in the best interests of the children. In the present case there is no such unity of interest. Furthermore, it is not in the best interests of minor girls that they be permitted to obtain abortions without parental consent or the consent of a judge of the Superior Court.

C. The statute is narrowly drawn and tailored to serve the best interests of minor, unmarried girls. Parents have always been presumed to act in the best interests of their minor children. However, the statute provides that if the minor girl's parents refuse to consent, the minor girl may obtain the consent of a judge of the Superior Court "for good cause shown."

D. The statute furthers legitimate as well as compelling state interests. First, it furthers the state interest in protecting the constitutional rights of parents to guide and protect their minor children. Second, it provides additional remedial safeguards to insure that physicians do not perform abortions on minor, unmarried girls without their parents' consent. The additional remedial safeguards include criminal fines and injunctive relief.

II.

The district court refused to join Mary Moe's parents as parties to this action. Since the disposition of this action has significantly affected the constitutional, common law and natural rights of Mary Moe's parents, they were denied their right to due process of law guaranteed by the Fifth Amendment because they were not given notice or an opportunity to be heard.

III.

The district court erred in refusing to appoint a guardian ad litem to protect the interests of Mary Moe. She was represented by the same attorney as the other three plaintiffs. The other three plaintiffs had a financial interest in the litigation. They, unlike Mary Moe, benefit only when an abortion is performed and only if it is performed at their facility.

IV.

The district court abused its discretion by refusing to certify questions to the Supreme Judicial Court for an interpretation of the "good cause shown" provision of the statute. Its decision is partially premised on the belief that the Supreme Judicial Court of Massachusetts will adopt a certain interpretation of the statute. In fact, the statute has never been interpreted by the Supreme Judicial Court, nor has it gone into effect within the Commonwealth.

Argument.

I. The Massachusetts Statute Prohibiting Physicians from Performing Abortions on Minor, Unmarried Girls Without Parental or Court Consent is Constitutional on its Face.

At the outset it should be understood that the issue raised by this appeal is not whether minor, unmarried girls have a right to obtain an abortion, but whether a physician may perform the abortion without first obtaining the consent of the girls' parents or the Superior Court. The statute at issue does not prevent minor girls from obtaining abortions but *is* merely protective legislation designed to protect pregnant minor girls who desire to have abortions.

The intervenor contends that the statute does not infringe upon any right of minor girls. It is merely a codification of the common law rule that minors are incapable of consenting to medical and surgical treatment. The primary purpose of the statute is to provide additional remedial relief to insure that physicians do not perform abortions on minors who are incapable of giving an informed consent. At common law the only remedy available against a physician who operated on a child without their consent was civil action for battery, instituted by the child's parents. The additional remedial relief offered by the statute includes criminal fines under Mass. G.L. c. 112, § 12P, and injunctive relief under Mass. G.L. c. 112, § 12R.

The intervenor contends that the district court totally misconstrued the intended purpose of the statute in question. Moreover, the district court's decision amounts to an unwarranted interference with the power of a state legislature to enact protective legislation for minor girls who desire abortions. The district court's decision rests on the faulty premise that physicians rather than parents will act in the best interests of pregnant, unmarried, minor girls.

A. *The Common Law Rule of Parental Consent Applies to Abortions as well as All Other Medical and Surgical Procedures.*

In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), this Court held that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Although *Wade* and its companion case, *Doe* v. *Bolton*, 410 U.S. 179 (1973), are far-reaching decisions, neither decision stands for the proposition that minor girls, or even adult women, have an absolute right to an abortion. See *Wade*, *supra*, at 153; *Bolton*, *supra*, at 189. Moreover, in *Wade* the Court explicitly stated that neither decision reached the issue of whether a state could require parental consent in the case of a minor unmarried girl. *Wade*, *supra*, at 165, n. 67.

One of the basic underlying premises of *Wade* and Bolton is that an abortion, at least in the first and second trimesters, is primarily a medical decision and, as such, should not be treated differently from other medical decisions. *Wade*, *supra*, at 163, 164, 166; *Bolton*, *supra*, at 192, 197, 199. Similarly, the Massachusetts statute seeks to insure that minors who desire abortions will not be treated differently in this decision than in other medical decisions where parental consent is required. Any decision to the contrary would elevate abortions above all other medical procedures.

The common law rule of parental consent is well-established in Massachusetts, as well as in other states. See *Reddington* v. *Clayman*, 334 Mass. 244, 134 N.E. 2d 920 (1956). The common law rule of parental consent is based on the presumption that minors are not competent or capable of consenting to

medical or surgical treatment. See Prosser, *Law of Torts*, § 18 (4th ed. 1971). Any medical procedure performed on a minor without parental consent would amount to a battery for which the physician could be held liable for damages. *Bonner* v. *Moran*, 126 F. 2d 121 (D.C. Cir. 1941); *Zoski* v. *Gaines*, 271 Mich. 1, 260 N.W. 99 (1935). Although this rule has sometimes been criticized as a vestige of the feudal notion that children are the property of their parents, it is designed to protect minors from their own improvidence and incapacity and to prevent unnecessary bodily intrusions by over-zealous physicians. See Note, 60 Va. L. Rev. 305, 309 (1974).

There is no doubt that this common law rule still has vitality. Recently, in *Relf* v. *Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), where the Department of Health, Education and Welfare was enjoined from disbursing federal funds for sterilization of minors and incompetents, the court noted that it was the "universal common law . . . rule that minors . . . cannot consent to medical operations." *Id.* at 1202, citing *Restatement of Torts*, § 59 (1934).

Furthermore, the Massachusetts statute provides for all common law exceptions to this rule. For example, it should be noted that under Mass. G.L. c. 112, § 12N, the parental consent provision of the statute does not apply in the case of an emergency. This provision reflects the long-recognized exception that a physician is not required to obtain parental consent when medical treatment is necessary to save the life or health of a child and the parents are unavailable. Prosser, *supra*, § 18; Wadlington, *Minors and Health Care: The Age of Consent*, 11 Osgoode Hall L.J. 115, 116 (1973). Another exception is where a child's parents arbitrarily refuse to consent to medical treatment necessary to preserve the life and health of the child; for example, where parents refuse to consent to a blood transfusion on the basis of religious beliefs. See, *e.g.*, *Raleigh Fitkin-Paul Morgan Memorial Hospital* v. *Anderson*, 42 N.J. 421, 201 A. 2d 537 (1964). See also Wadlington, *supra*, at 116. In such situations, the courts have appointed guardians for the limited purpose of granting consent. The Massachusetts statute, however, goes beyond even these exceptions by providing that if a girl's parents refuse to consent to an abortion, "consent may be obtained by order of a judge of the superior court for good cause shown," even though there is no emergency, and the girl's life or health is not in danger.

B. *The Right to Privacy should Not be Extended to Include Minors who Seek Abortions Without Parental or Court Consent.*

The district court held that "there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age" (A.J.S. 14). The district court further held there was "no room for dispute" that the holding of *Wade*, *supra*, applies to minors as well as adults (A.J.S. 14-15). The intervenor contends that this Court has never held that minors should be extended the same constitutional rights and privileges as an adult. Moreover, the intervenor contends that there are substantial reasons for not allowing minors to obtain abortions without parental consent.

It is important to note at this point that there is a fundamental difference between *Wade*, *supra*, and the present case. In *Wade* it was assumed that the initial decision to have an abortion is left to the pregnant woman. After this decision is made, a physician must determine in his best medical judgment whether to effectuate the pregnant woman's initial decision to have an abortion. *Wade*, *supra*, at 163, 164. Thus, *Wade* dealt with the effectuation of a pregnant woman's informed decision. However, in the present case minor girls are not capable of making this initial decision.

Furthermore, this Court has never held that the constitutional rights of minors are coextensive with those accorded to adults. For example, in *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), the Court held that minors were not entitled to a trial by jury. However, only three years before the Court's decision in *McKeiver*, the Court held in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), that the right to a trial by jury is fundamental. Moreover, minors traditionally have not been accorded other rights which have been held to be fundamental for adults. For example, even though the right to vote was held to be a fundamental right in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), minors under 18 have not been permitted to vote in either state or federal elections. See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Also, many states, including Massachusetts, require minors under 18 to obtain parental consent as a precondition to valid marriage even though the right to marry was held to be a fundamental right in *Loving* v. *Virginia*, 388 U.S. 1 (1967). However, this is not to say that minors totally lack constitutional rights, but that the state has a broader power to regulate the activities of minors. *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944).

Although the scope of minors' constitutional rights is unclear, an analysis of the decisions of this Court reveals that minors have been extended constitutional rights only in cases where there is a unity of interest between the parents and the child in opposition to the challenged state regulation. For example, in the landmark case of *In re Gault*, 387 U.S. 1 (1967), the Court held that juveniles were entitled to certain fundamental procedural safeguards in delinquency proceedings. It is important to note that Gault's parents commenced the action by a petition for writ of habeas corpus seeking the release of their 15-year-old son. Gault's parents alleged that they had been denied custody of their child without due process of law. Thus, the language in *Gault* that "neither the

Fourteenth Amendment nor the Bill of Rights is for adults alone," *id.* at 13, must be viewed in its proper perspective. Another important case involving the constitutional rights of minors is *Tinker* v. *Des Moines Indep. Com. School District*, 393 U.S. 503 (1969). In *Tinker* the Court held that students could not be suspended from school merely because they wore black armbands in protest of the Vietnam War. However, the facts of *Tinker* clearly indicate that the students who wore the black armbands had the full support of their parents. A group of the students and their parents had met and discussed this activity prior to the students' wearing the armbands in school. *Id.* at 504.

The existence of this unity of interest between parents and children has been a common thread in virtually every case where constitutional rights have been extended to children. See, *e.g.*, *School District of Abington* v. *Schempp*, 374 U.S. 203 (1963) (action brought by parents to enjoin the enforcement of a state statute requiring a reading from the Bible at the beginning of each school day); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (parents brought an action challenging the constitutionality of a state regulation which required daily prayers in the public schools); *Doremus* v. *Board of Education*, 342 U.S. 429 (1952) (the parent of a 17-year-old high school student challenged a state statute which required daily reading from the Bible); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (parents and children who were Jehovah's Witnesses challenged a state statute requiring children to salute the flag).

The intervenor has been unable to find any case where the Court has extended constitutional rights to minors when the state interest in regulating the affairs of minors was coextensive with that of the minors' parents. The intervenor contends that when such a situation exists the state is free to regulate the affairs of minors even though such regulation would be

unconstitutional if applied to adults. See *Ginsberg* v. *New York*, 390 U.S. 629 (1968). The intervenor further submits that constitutional rights should be extended to minors only when the exercise of such rights furthers their own best interests and where there is a unity of interest between the parents and the minor in opposition to the challenged state regulation. Neither of these factors exist in the present case. Moreover, there are substantial and compelling reasons for not permitting physicians to perform abortions on minor girls without parental or court consent.

The primary purpose of the Massachusetts statute is to insure that minors give an informed consent to an abortion. An informed consent includes not only a knowledge of the medical aspects of the abortion procedure and its possible complications, but also the ability and experience to grasp the implications of the decision (A. 341). Traditionally, the common law rule of parental consent has insured that minors give an informed consent to medical procedures. Accordingly, in an age when physicians are required to obtain parental consent for setting a child's broken arm or even piercing a young girl's ears, it would truly be odd not to require parental consent for an abortion.

First trimester abortions are generally performed by dilation and curettage or by vacuum aspirator (A. 308). The latter method was used by Dr. Zupnick on Mary Moe (Tr. 139, 142; A. 204, 229-30). However, even an abortion by vacuum aspirator involves a serious bodily intrusion on the person of a minor girl. As Dr. Zupnick testified, this procedure involves the insertion of a speculum, dilators and the nozzle of the aspirator into the vagina and uterus of the girl (A. 229-30). It involves the use of anesthesia (A. 230) and the procedure is followed by bleeding which usually lasts two or three days but may last as long as ten days or more (A. 251). Moreover, there is the risk of complications. The physical complications which

may result from an abortion include perforation of the uterus, which can cause sterility, and fever or pain, which is indicative of infection (A. 110-11). There is also an increased risk in subsequent pregnancies of premature deliveries, spontaneous midtrimester abortions and faulty implantation with subsequent errors in placental development (A. 310-11). Moreover, if the girl has blood type of RH-negative, an injection of RHOgam serum must be given within 72 hours of the abortion or there is a risk that subsequent pregnancies could result in the birth of what is commonly known as a "blue baby" (A. 247-48). About 15 per cent of the population have a blood type of RH-negative (A. 247).[7]

Apart from weighing the physical implications of the abortion procedure, there is the added problem of resolving the serious and problematical, ethical and philosophical issues which, like it or not, are present in the abortion decision. As this Court noted in *Roe* v. *Wade*, *supra*, at 116:

> We forthwith acknowledge our awareness of the sensitive nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

[7] These complications are supported by the medical literature. See Osofsky & Osofsky, *The Abortion Experience: Psychological & Medical Impact*, 377-81 (1973).

Surely, society should not permit a minor girl to shoulder the burden of this decision without the aid and assistance of her parents.

For a minor girl, an unwanted pregnancy results in a psychological crisis involving one's sense of femininity and growing sexuality (A. 338). It is a unique experience for a minor girl. The pregnancy can have a strong impact on a minor girl's emotional development (A. 338). The girl may be frightened and feel compelled to seek an immediate solution to the problem. In this context it is important that the minor girl know that she has made the "best possible decision" (A. 340). This is where the girl's parents can play an important role. They are most knowledgeable of the girl's needs and level of emotional maturity. By working closely with their daughter, the parents are in a position to help her make a decision that will, in the long run, serve her best interests.

In the present case, the intervenor submits that Mary Moe did not give an informed consent to the abortion. As Judge Julian pointed out in his dissent:

> The majority find that Mary Moe was competent to make and effectuate the decision to abort. The majority also find there are other unmarried pregnant minors in Massachusetts who have adequate capacity to give a valid and informed consent to an abortion. These findings are not warranted by the evidence.
>
> In order for consent to be informed, a minor must understand the emotional as well as the physical consequences which may follow from an abortion. The testimony of the psychiatrists is unanimous on this point. . . . No testimony was offered, however, concerning the emotional consequences the abortion may or will have upon Mary Moe. No testimony was presented concerning Mary Moe's understanding of those consequences or her ability to understand them. In making their findings the majority must necessarily have applied a test of informed consent which looks only to the minor's ability to understand the consent form, surgical procedure and direct physical effects. The majority disregard that aspect of informed consent which requires that a minor must understand the emotional consequences which may follow an abortion. (A.J.S. 24-25.)

It is also important to note that when Mary Moe testified on December 31, 1974, she had not returned to Parents Aid for a follow-up visit with a physician, even though two months had elapsed since her abortion on October 31, 1974 (Tr. 154-56). She testified that there was a $20 charge for this visit which she would pay for out of the "Christmas" money she received from her brother and grandmother (Tr. 155). The intervenor submits that it is patently unconscionable to presume that a girl who does not understand the importance of follow-up medical care is capable of deciding whether an elective medical procedure is in her best interests. Such a delay would have been avoided had her parents been involved from the beginning.

C. *The Massachusetts Statute is Narrowly Drawn and Tailored to Serve the Best Interests of Minor, Unmarried Girls.*

At the outset, the intervenor takes issue with the plaintiffs' characterization of the statute as a "state-sanctioned parental veto." By its very terms the statute provides that parents do not have the absolute power to veto a minor's decision to have an abortion. First, the statute does not apply in the event of an emergency. See Mass. G.L. c. 112, § 12N. Secondly, the

statute specifically provides that if a minor's parents refuse consent, a judge of the Superior Court may, for good cause shown, consent to an abortion.

The district court decision is premised on the theory that the statute is overly broad because it applies to certain minor girls under 18 who are capable of giving an informed consent for an abortion. Although there is some disagreement between the plaintiffs' and defendants' experts over whether minor girls under 18 could give an informed consent, defendants' experts testified that minor girls under 18, as a class, are not capable of giving an informed consent. However, defendants' experts did concede that some girls under 18 were capable of giving an informed consent. The district court accepted the view of defendants' experts (A.J.S. 8).

Although it may be true that certain minor girls under 18 are capable of giving an informed consent, it does not necessarily follow that the statute is unconstitutional. In passing, it should be noted that the plaintiffs challenged the statute on its face and not as applied. The real question is who should decide whether a particular minor girl is capable of giving an informed consent. As the district court noted, "[o]f necessity, there will be factual questions to weigh in each case" (A.J.S. 12). Moreover, certain minor girls may appear to act quite maturely one day and immaturely the next.

The intervenor contends that the parents or a judge of the Superior Court are in the best position to determine whether a particular minor girl is capable of giving an informed consent. The parents are the ones who know the girl best and who are in the best position to determine whether an abortion is in her own best interest. The parents can also help the girl in selecting a physician who will perform the abortion at an approved facility and can insure that the girl receives proper follow-up

care if it is necessary.[8] Contrary to the belief of Mary Moe and other pregnant young girls, the vast majority of parents are compassionate and are ready, willing and able to help their daughters in this time of need.

---

[8] Mrs. Hunerwadel's testimony concerning the role of parents is as follows:

> Q. Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?
>
> A. Yes, there are.
>
> Q. Tell us what those circumstances would be.
>
> A. We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of the child. We would like to be able to make available to her our support and our interest and our care as we have from the time that we have known she was coming to us.
>
> We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; that that would not be the end of our involvement.
>
> We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done was one which had adequate services all around, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.
>
> We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.
>
> And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.
>
> So those kinds of decisions would be very important to us to help her to make. (A. 361-62.)

In cases where a girl's parents refuse to consent to a physician performing an abortion on their daughter, the statute provides a minor girl the absolute right to petition a judge of the Superior Court who, for "good cause shown," may consent to an abortion. In determining good cause shown, it must be presumed the judge consider the minor girl's age, her relative degree of maturity, whether she is living at home with her parents, and whether her parents' reasons for not consenting were arbitrary, capricious or not in the best interests of a minor girl. Contrary to the district court decision (A.J.S. 13), it must also be presumed that the judge will consider only the best interests of the minor girl.

The Superior Court judge plays a vital role in determining whether an abortion is in the best interests of a minor girl. As one of the plaintiffs' experts noted, there are many doctors who may perform surgical operations based on personal beliefs, such as an aversion to welfare, population control and their conception of the size of an ideal family. The intervenor contends that the Superior Court judge rather than the physician should be the one to decide whether or not the girl is capable of giving an informed consent.

Thus, unlike the statutes declared unconstitutional in *Coe* v. *Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1973), *appeal dismissed*, 417 U.S. 279 (1974), *Wolfe* v. *Schroering*, 388 F. Supp. 631 (W.D. Ky. 1974), and *State* v. *Koome*, 84 Wash. 2d 901, 530 P. 2d 260 (1975), which did not contain provisions for judicial review, the Massachusetts statute is narrowly drawn. In *State* v. *Koome, supra*, which was a four-one-four plurality decision, the concurring opinion of Justice Finley indicates that the Washington statute would have been upheld if minors had a procedure for judicial review similar to the Massachusetts statute. He stated:

> What is needed is a procedure which assures access to the judicial system for a determination of whether legally justifiable reasons exist to prevent a minor from having an abortion. Whatever process is devised, it should not be so cumbersome and onerous as to preclude the minor — for pecuniary or other reasons — from having access to that process. *Id.* at 917, 530 P. 2d at 270.

It should also be noted that even those members of the court which made up the plurality in *State* v. *Koome, supra*, did not feel that a minor had an absolute right not to inform her parents that she wished to have an abortion, as the plaintiffs here have contended. The plurality felt that the state could constitutionally require a "certificate of parental *consultation* [as a] prerequisite to a minor's abortion." (Emphasis in opinion.) *Id.* at 909, 530 P. 2d at 266.

Although it might be argued that the two-parent requirement of the statute is overly burdensome, such is not the case. At common law, all parental rights and obligations were vested in the father. *Pyle* v. *Waechter*, 202 Iowa, 695, 210 N.W. 926 (1926); *Soper* v. *Igo, Walker & Co.*, 121 Ky. 550, 89 S.W. 538 (1905); *Matthewson* v. *Perry*, 37 Conn. 435 (1870); *Logan* v. *Murray*, 6 Serg. & R. (Penn.) 175 (1820). The mother, who had no such rights or obligations, was entitled "only to reverence and respect." *People ex rel. Barry* v. *Mercein*, 3 Hill (N.Y.) 399, 408 (1842). The two-parent requirement is merely a reflection of the modern view that marriage is a "cooperative enterprise" and that children are entitled to the "affection, companionship, moral support, and guidance of both the father and mother." *Russick* v. *Hicks*, 85 F. Supp. 281, 284 (W.D. Mich. 1949). See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). The statute further specifi-

cally provides that only one parent is required if "one of the parents has died or has deserted his or her family."

Furthermore, the provision for judicial review is not burdensome as was the case in *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah, 1973), where even if a minor girl's parents consented to an abortion a judicial hearing was required to determine whether the consents given by the minor girl and her parents were freely and voluntarily given. Also, the minor girl was questioned as to her knowledge regarding the availability of adoption and other details concerning fetal development and the abortion procedure.

D. *The Massachusetts Statute Furthers Legitimate as well as Compelling State Interests.*

The intervenor contends that the Massachusetts statute must be upheld if it is found to further a legitimate state interest. The stringent standards of the compelling state interest test used by the Court in *Wade, supra*, at 155, should not be applied to the facts of this case because the Massachusetts statute merely regulates the procedure to be followed by physicians who perform abortions on minor girls. The Massachusetts statute in no way prohibits minors from obtaining abortions. However, the intervenor submits the interests furthered by the statute are of compelling nature as well.

The primary interest served by the statute is that it insures parents the opportunity to guide and protect their minor children in medical decisions. The statute reflects the long-recognized general principle that the care and protection of children reside primarily in the parents. *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

This Court has frequently held that parents have a constitutional right and duty to guide and protect their minor children. In *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923),

the Court noted that the right to liberty guaranteed by the Fourteenth Amendment includes "to marry, establish a home and bring up children." Two years later, in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court reaffirmed the liberty of parents to direct the upbringing of their children by holding that parents have a right to choose whether their children will be educated in a private or public school. Recently, in *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972), the Court stated: "The history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." In *Yoder* the Court even went so far as to say that the liberty of parents includes "the inculcation of moral standards religious beliefs, and elements of good citizenship." *Id.* at 233. See also *Wade, supra*, at 152-53; *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972).

Contrary to the district court decision, the constitutional rights of parents are not in conflict with the potential rights of minors. As Judge Julian pointed out in his dissent, parental "rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and reflect the child's very real need for proper guidance and protection during the child's formative years" (A.J.S. 25).

By requiring minor girls to seek the support, guidance and consent of their parents, the statute adheres to the traditional notion that parents, at least in the first instance, are the primary guardians of their minor children. As the Court stated in *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." By allowing the minor girl to seek

the consent of a judge of the Superior Court, the statute guards against parents whose refusal to consent is not in the best interests of the minor girl.

As previously stated, the Massachusetts statute is a codification of the common law rule that minors are not capable of consenting to medical treatment. Thus, the statute does not infringe upon any right of minor girls. However, it does provide additional remedial safeguards. These safeguards include a criminal fine under § 12Q, "of not less than one hundred dollars nor more than two thousand dollars" for any physician who performs an abortion contrary to the provisions of § 12P. Moreover, under § 12R, the Attorney General or anyone whose consent is required under the statute may petition the Superior Court for an order enjoining an abortion performed contrary to the provisions of § 12P.

In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), where this Court upheld a statute which prohibited a vendor from selling to minors certain reading material which would *not* be obscene for adults, the Court stated that "[t]he legislature could properly conclude that parents . . . who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* at 639.

The need for additional remedial relief in this area cannot be overestimated. Without the criminal and injunctive sanctions to enforce the statute, the only remedy against a physician who performed an abortion on a minor without the proper consent would be a civil action for damages for battery. The appellant submits that this remedy is inadequate for two reasons. First, a minor is naturally more reluctant to inform her parents that she is pregnant and desires to have an abortion than she would be if she needed a tonsillectomy. In a moment of stress and fear, a minor girl could seek an abortion from a physician who would not have an interest in her long-

term well-being. Accordingly, a minor girl's parents may never know that their daughter had an abortion, and thus never have an opportunity to sue the physician who performed the abortion. Second, there are physicians such as Dr. Zupnick who willingly perform abortions on minor girls without parental consent. Thus, it can be seen that the remedial provisions of the statute act as an effective deterrant to physicians who would not otherwise require parental consent (A. 202).

II. The District Court Erred in Refusing to Join as Defendants the Parents of Mary Moe.

The district court erred in refusing to join the parents of Mary Moe as parties to this action. Her parents were neither notified that she was a party to this action, nor were they informed that she was pregnant and desired to have an abortion without their consent. They were completely denied any opportunity to consent to the abortion or to guide their child in her decision to have an abortion. Moreover, they had no opportunity to aid her in selecting the health care facility or the physician who would perform the abortion as they would in any other medical procedure.

The failure of the district court to join Mary Moe's parents as party defendants has denied her parents their parental rights without due process of law. As Senior District Judge Anthony J. Julian stated in his dissent: "Adjudication of this case significantly affects constitutional, statutory and common law rights of parents" (A.J.S. 20). These rights include the parents' right to guide and protect their minor children and, more specifically, the parents' right to consent to surgical procedures performed on their minor children. Mary Moe's parents were denied their right to due process of law guaranteed by the Fifth Amendment because they were not notified

that their daughter was a party to this action and, consequently, they were not given an opportunity to defend these rights. See *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223, 233 (1863). Moreover, since the disposition of this action has, as a practical matter, impeded or impaired Mary Moe's parents in protecting these rights, they should have been joined as necessary parties under Fed. R. Civ. P. 19(a). Cf. *Thompson* v. *Groshens*, 342 F. Supp. 516 (E.D. Pa. 1972), *affirmed*, 475 F. 2d 127 (3d Cir. 1973), *cert. denied*, 414 U.S. 825 (1973).

III. The District Court Erred in Refusing to Appoint a Guardian Ad Litem to Protect the Interests of Mary Moe.

The district court refused to appoint a guardian ad litem to protect the interests of Mary Moe. She was represented by the same attorney who represented plaintiffs Baird, Zupnick and Parents Aid. As Judge Julian stated in his dissent, these three parties "receive substantial income from abortions performed on minors and thus have a financial interest in the outcome of this litigation" (A.J.S. 22). The intervenor seriously questions whether the three plaintiffs, who receive compensation only when an abortion is performed and only if it is performed at their facility (A. 256), have the same interest as a minor who is wrestling with the decision of whether or not to terminate her pregnancy.

In *Noe* v. *True*, 507 F. 2d 9 (6th Cir. 1974), where the court was confronted with a similar set of facts, the court held that it was error not to appoint a guardian ad litem for a 14-year-old pregnant girl. They found that the necessity for the appointment of a guardian ad litem was "particularly critical" in light of the controversial nature of the legal issues and the

fact that the minor was pregnant out of wedlock with no natural parent or guardian. *Id.* at 11. The court further noted that "the mere presence of an attorney representing her in the action is insufficient of itself to protect her personal interests in the action" and that there was a "very real need of a 14-year-old plaintiff to have her own personal rights and interests protected." *Id.* at 12.

The district court relied on *Foe* v. *Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975), in holding that it was not necessary to appoint a guardian ad litem. However, the district court's reliance on *Vanderhoof* is misplaced. In *Vanderhoof*, the minor girl's attorney did not represent conflicting interests. Also, the minor girl in *Vanderhoof* had met with her mother, doctor and social worker to discuss her pregnancy, the abortion decision and the consequences of her decision. The court also appointed an obstetrician and psychiatrist to examine and counsel the minor. The two doctors appointed by the court recommended that the minor be given an abortion. As Judge Julian noted in his dissent, no such precautions were taken in the present case (A.J.S. 24).

IV. The District Court Erred in Refusing to Certify Questions of State Law to the Supreme Judicial Court of Massachusetts.

The district court's decision is premised on its interpretation of the "good cause shown" provision of the statute. The statute provides: "If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary." The district court has speculated that this provision requires the Superior Court judge to weigh the divergent interests of parents as well as the interests of the minor in

deciding whether to consent to an abortion. The district court further presumes that the parents' interests would prevail. Since the Supreme Judicial Court has never had an opportunity to interpret the meaning of this language and there is no indication how the judges of the Superior Court would interpret this provision in practice, the district court abused its discretion by refusing to certify questions concerning the interpretation of this provision to the Supreme Judicial Court under Rule 3:21 of that court. See *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974).

Conclusion.

It is respectfully submitted that the Court should reverse the order entered in the district court.

Respectfully submitted,

THOMAS J. McMAHON,
P.O. Box 28,
Walpole, Massachusetts 02081.
BRIAN A. RILEY,
MARY LAURA RUSSELL,
Suite 524,
40 Court Street,
Boston, Massachusetts 02108.
Attorneys for the Appellant.

Of Counsel:
THOMAS P. RUSSELL,
ROBERT J. REYNOLDS,
Suite 524,
40 Court Street,
Boston, Masachusetts 02108.
MARY T. WELBY,
51 St. Rose Street,
Boston, Massachusetts 02130.